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September 15, 2002

VIA EMAIL & HAND-DELIVERY

Mai T. Dinh, Esq.
Acting Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

RE: Comments to Notice of Proposed Rulemaking

Dear Ms. Dinh:

This provides comments on behalf of National Grid USA on the Federal Election Commission's ("FEC's" or "Commission's") Notice of Proposed Rulemaking ("NOPR") published on August 22, 2002. National Grid USA is an indirect wholly-owned U.S. subsidiary of National Grid Group, a U.K. company. Both companies are registered public utility holding companies under the Public Utility Holding Company Act of 1935, as amended ("PUHCA"). The NOPR in question proposes rules to implement the contribution limits and certain prohibitions under the Bipartisan Campaign Reform Act of 2002 ("BCRA"). We appreciate the Commission's laudable efforts in promulgating rules to implement the BCRA, especially given the time restrictions imposed on such rulemaking by the BCRA. However, we have serious concerns regarding the Commission's statements made in the NOPR suggesting that it is contemplating extending the ban on foreign national contributions to foreign owned U.S. companies and their political action committees ("PACs"). Such extension would be improper and unduly restrict the legitimate and protected rights of a U.S. company and its employees to participate in the political process.

I. The FEC Proposal

Section 303 of the BCRA amends the current ban on foreign national contributions by making clear that the ban applies to so-called "soft money" contributions (i.e., contributions to state and local candidates and to non-federal accounts of party committees) as well as to "hard money" contributions (i.e., federal contributions). In particular, the BCRA prohibits a foreign national from "directly or indirectly" making such contributions. This replaces the current language which prohibits a foreign national from making a contribution directly or "through any other person." Citing the purpose of this Section of the BCRA, which is to "strengthen the ban on contributions and donations by foreign nationals," the Commission seeks comments as to whether the term "indirectly" should be interpreted to extend the ban (1) to state and local contributions made by a U.S. subsidiary of a foreign company and (2) to federal contributions made by such U.S. subsidiary's PAC.

II. The Proposal Contravenes the Plain Language and Purpose of BCRA

Expanding the foreign national contribution ban to U.S. subsidiaries and their PACs is contrary to the plain language and the purpose of the BCRA. By prohibiting indirect contributions by a foreign national, the plain language of BCRA requires some sort of action or involvement by the foreign national in the contribution. The language does not lend itself to an interpretation that creates a ban merely by association where a U.S. company or PAC is banned solely because of its relationship with a foreign company, even though no foreign national or foreign funds are involved in the contribution. To take such expansive approach, the statute would have to state that such relationship is sufficient to trigger the ban rather than just use the term "indirectly." For example, PUHCA also prohibits regulated holding companies from making a contribution "directly or indirectly." 15 U.S.C. § 79e(h). However, PUHCA expressly makes clear that it also prohibits contributions made by subsidiary companies. Id. Moreover, even with the "direct or indirect" language, PUHCA has been read to permit a holding company or its subsidiary to maintain a PAC. Securities and Exchange Commission, 1976 WL 10377 (No-Action Letter re: New England Power Service Company).

Please note that the Commission has already created a proper framework for prohibiting indirect contributions by foreign nationals. Although the current language of the foreign national ban uses the words "through any other person" rather than "indirectly," the Commission has not interpreted the current language as applying only to conduit situations, as suggested in the NOPR. Rather, the Commission has equated the language to a ban on indirect contributions. See,

e.g., FEC AOs 1981-36 (The U.S. subsidiary should not become a vehicle for indirect contributions by a foreign national); 1985-3. In so doing, the Commission has prohibited U.S. subsidiaries from (1) using foreign funds to make contributions or to pay for the administrative expenses of a PAC, or (2) permitting a foreign national to be involved in the U.S. subsidiary's decision to make contributions or in the operation of its PAC. See 11 C.F.R. § 110.4; FEC AOs 1977-53, 1981-3, 1995-15. The Commission has never applied such indirect standard to create a *per se* prohibition on contributions made by a U.S. subsidiary of a foreign company or its PAC. Thus, the BCRA confirms and codifies the current approach of the FEC.

Deviating from this approach would violate the purpose of the BCRA. The purpose of the ban on foreign national contributions is clear -- to eliminate the influence of foreign nationals on the electoral process. That is exactly what the Commission is already doing by prohibiting the use of foreign funds and the involvement of a foreign national in the operation of a PAC or in the decision to make a contribution. Creating a *per se* prohibition on U.S. subsidiaries and their PACs would be excessive and would not go to further the purpose of the foreign national ban.

We note that the BCRA was intended to strengthen the ban on foreign national contributions. However, Congress's intent was to strengthen the ban by clearly prohibiting soft money contributions by foreign nationals. 148 Cong. Rec. S1994 (March 18, 2002) (Statement by Senator Feingold); H339-02, H355 (daily ed. February 13, 2002) (Statement by Rep. Kirk). There is no indication, whatsoever, that Congress wanted to extend the ban to U.S. subsidiaries or their PACs. This absolute silence says volumes. In particular, if Congress intended to create such a drastically new approach to U.S. subsidiaries and their PACs, it would have done so explicitly and not through a veiled reference to the word "indirectly." Indeed, Congress has in the past attempted on two separate occasions to expressly prohibit U.S. subsidiaries and their PACs from contributing -- Senator Lloyd Benson proposed a Senate Bill in 1990 and Rep. Marcy Kaptur proposed a House Bill in 1998. Both attempts failed. However, they demonstrate that Congress is well versed on the issue of possibly banning U.S. subsidiaries and their PACs and would have expressly included such ban in BCRA if it intended to do so. By promulgating a rule in such blatant contravention of the plain language of the BCRA and Congressional intent, the FEC would be overstepping its authority.

III. The Proposal Is Contrary to Public Policy and the Constitution

A U.S. subsidiary is a U.S. entity and has its own legitimate interests for participating in the political process, separate and apart from those of its foreign

parent.[1] Indeed, a U.S.-subsidiary is a U.S. company in every respect. It is created and governed under U.S. law and pays taxes like any other U.S. company. Thus, its interest in participating in the electoral process is just as legitimate and protected as other U.S. companies and should not be abridged as long as neither foreign nationals or their funds are involved.

More importantly, the proposed expansion of the ban on foreign national contributions is particularly egregious and unwarranted when it comes to a U.S. subsidiary's PAC. Such PAC is wholly funded by individual U.S. citizens and permanent residents who are employees of the U.S. subsidiary, as required under the current law. The nexus between those employees and the ultimate foreign parent is even more remote, than between the U.S. subsidiary and the foreign parent. Moreover, by prohibiting the establishment of such PAC, the Commission would be depriving those U.S. citizens of their ability to pool their funds and participate in the political process, merely because their employer happens to be owned by a foreign parent. Thus, the Commission's proposal would arbitrarily discriminate between U.S. citizens based on their employer. Such result is unacceptable given that all U.S. citizens have the same legitimate interest and Constitutional right to participate in the political process, regardless of their employer.

IV. Conclusion

For the foregoing reasons, we urge the Commission to reject the proposal to expand the foreign national ban to U.S. subsidiaries and their PACs.

Sincerely,

Ki P. Hong

On behalf of National Grid USA

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[1] Please note that National Grid USA does not make any corporate contribution at the state or local level because of restrictions under PUHCA. National Grid USA, however, maintains a federal PAC and a New York State PAC.